

# IN THE SUPREME COURT OF TEXAS

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No. 02-1031

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REATA CONSTRUCTION CORPORATION, PETITIONER,

v.

CITY OF DALLAS, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

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**Argued December 12, 2004**

JUSTICE BRISTER, joined by JUSTICE HECHT and JUSTICE O'NEILL, concurring.

I join in the Court's judgment, as American law has long held that a government waives immunity from suit by filing an affirmative claim in court. I write separately because I disagree with the State that this rule is mistaken, and with the Court that we must partially abrogate sovereign immunity because the rule is in "tension" with other jurisdictional rules. Instead, sovereign immunity has always had its own set of jurisdictional rules because jurisdiction over private and public parties is simply different.

In all cases, whether the parties are public or private, a court must have jurisdiction to issue a binding judgment. But "[j]urisdiction," as the United States Supreme Court recently observed, "is a word of many, too many, meanings."<sup>1</sup> Both subject-matter jurisdiction and personal jurisdiction

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<sup>1</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted).

are “jurisdictional” in that a court cannot enter judgment without them.<sup>2</sup> Sovereign immunity is also “jurisdictional,” but in ways that do not fit neatly into the other two categories.

Subject-matter jurisdiction concerns a court’s power over cases.<sup>3</sup> It stems from the doctrine of separation of powers, and aims to keep the judiciary from encroaching on subjects properly belonging to another branch of government.<sup>4</sup> Subject-matter jurisdiction cannot be waived or conferred by agreement, must be considered by a court *sua sponte*, and can be raised for the first time on appeal.<sup>5</sup>

Personal jurisdiction, by contrast, concerns a court’s power over parties.<sup>6</sup> A court cannot enter judgment against a party who has not been haled into court through proper service,<sup>7</sup> and its writ extends beyond its borders only as far as due process allows.<sup>8</sup> Personal jurisdiction can be voluntarily waived by appearance,<sup>9</sup> or impliedly by an untimely objection.<sup>10</sup>

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<sup>2</sup> See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999); *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); see also *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107 (Tex. 1933).

<sup>3</sup> See *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235, 1244 (2006); *CSR Ltd.*, 925 S.W.2d at 594.

<sup>4</sup> See *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

<sup>5</sup> See *Univ. of Texas Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004).

<sup>6</sup> See *CSR Ltd.*, 925 S.W.2d at 594.

<sup>7</sup> See *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

<sup>8</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>9</sup> See *Hilburn v. Jennings*, 698 S.W.2d 99, 100 (Tex. 1985).

<sup>10</sup> See TEX. R. CIV. P. 120a.

Throughout Texas history, we have held that sovereign immunity is “jurisdictional”<sup>11</sup> but without characterizing it as either subject-matter or personal jurisdiction. To the contrary, in *Anderson, Clayton* we held that when the State waived immunity by filing suit, the trial court “acquired jurisdiction of the *parties and subject-matter*.”<sup>12</sup>

In the last seven years we have addressed sovereign immunity almost exclusively in terms of subject-matter jurisdiction.<sup>13</sup> This approach began with a per curiam opinion in 1999,<sup>14</sup> which distinguished a 1988 opinion that appeared to say the opposite.<sup>15</sup> But acknowledging that sovereign immunity implicates subject-matter jurisdiction does not mean it does not implicate personal jurisdiction, too. Indeed, the earliest Texas cases, dating even from the Republic, addressed

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<sup>11</sup> See, e.g., *Missouri Pacific R.R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 814 (Tex. 1970); *State v. Lain*, 349 S.W.2d 579, 581-82 (Tex. 1961); *W. D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 841 (Tex. 1958); *Walsh v. Univ. of Tex.*, 169 S.W.2d 993, 994 (Tex. Civ. App.-El Paso 1942, writ ref’d).

<sup>12</sup> *Anderson, Clayton*, 62 S.W.2d at 110 (emphasis added).

<sup>13</sup> See, e.g., *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *Dep’t of Transp. v. Garza*, 70 S.W.3d 802, 808 (Tex. 2002); *Tex. Dep’t of Criminal Justice v. Miller*, 51 S.W.3d 583, 585 (Tex. 2001).

<sup>14</sup> See *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam).

<sup>15</sup> See *Davis v. City of San Antonio*, 752 S.W.2d 518, 520 (Tex. 1988) (“We do not read our opinion in *Duhart* [a previous sovereign immunity case] as holding that the trial court lacked subject matter jurisdiction of the case and that any judgment rendered for the plaintiff would have been void.”). Between 1988 and 1999, the Seventh Court of Appeals had suggested sovereign immunity concerned both. See *Bd. of County Comm’rs of County of Beaver Okl. v. Amarillo Hosp. Dist.*, 835 S.W.2d 115, 130 n.2 (Tex. App.-Amarillo 1992, no writ) (“[S]overeign immunity concerns *both* subject matter jurisdiction and personal jurisdiction.”) (emphasis added); *Laykin v. McFall*, 830 S.W.2d 266, 267 n.1 (Tex. App.-Amarillo 1992, no writ) (same).

sovereign immunity in terms of “amenability” to suit,<sup>16</sup> a term borrowed for personal jurisdiction.<sup>17</sup>

These early Texas cases were not aberrations; sovereign immunity has historically been considered a problem primarily of personal jurisdiction. Blackstone addressed sovereign immunity under “The Rights of Persons,” concluding that sovereign immunity arises from the nature of the sovereign party, not the subject matter of the sovereign’s case:

Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king?<sup>18</sup>

Once bereft of kings, the earliest American cases still viewed sovereign immunity in terms of personal jurisdiction.<sup>19</sup> In *The Federalist* No. 81, Alexander Hamilton borrowed the language of personal jurisdiction in stating, “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT.”<sup>20</sup> In the United States Supreme Court’s first major opinion, the state of Georgia refused to file a plea or appear at oral argument for fear that its

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<sup>16</sup> See, e.g., *Kenedy v. Jarvis*, 1 S.W. 191, 194 (Tex. 1886); *Bd. of Land Comm’rs v. Walling*, Dallah 524 (Tex. 1843) (“[I]t is one of the essential attributes of sovereignty not to be amenable to the suit of a private person without its own consent . . .”).

<sup>17</sup> See, e.g., TEX. FAM. CODE § 157.375(a) (“While in this state for the sole purpose of compelling the return of a child through a habeas corpus proceeding, the relator is not *amenable* to civil process and is not subject to the jurisdiction of any civil court except the court in which the writ is pending.”) (emphasis added); TEX. R. CIV. P. 120a(1) (providing for special appearances to object to jurisdiction “over the person or property of the defendant on the ground that such party or property is not *amenable* to process issued by the courts of this State”) (emphasis added).

<sup>18</sup> 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND \*235.

<sup>19</sup> See generally Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

<sup>20</sup> THE FEDERALIST No. 81 (emphasis in original).

appearance would waive sovereign immunity.<sup>21</sup>

The full story is that sovereign immunity includes concerns about both subject-matter and personal jurisdiction, but is identical to neither. In terms of subject matter, whether a government ought to compensate particular claimants involves policy issues beyond the traditional scope of judicial proceedings.<sup>22</sup> But at the same time, there is some incongruity in saying that routine tort and contract suits are beyond the traditional subject matter of the courts simply because one party is a government employee.<sup>23</sup>

Similarly, concerns about a court's power to order the government to appear, give evidence, and pay a judgment share much in common with personal jurisdictional limits over foreign parties. Yet, it seems awkward to say Texas courts cannot "reach" other Texas governmental units, when all necessarily share the same space, and sometimes the same buildings.

Given these similarities and differences with each doctrine, it should come as no surprise that the jurisdictional rules governing sovereign immunity borrow from both but are identical to neither. Thus, just like subject-matter jurisdiction, sovereign immunity may be raised by the court even if the

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<sup>21</sup> See Nelson, *supra* note 19 at 1598 (discussing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

<sup>22</sup> See *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 414 (Tex. 1997) (Hecht, J., concurring) ("[N]ot all the factors that weigh in determining the State's liability on its contracts can be assessed in a judicial proceeding.").

<sup>23</sup> See *State v. Snyder*, 18 S.W. 106, 107 (Tex. 1886) ("The state, as a plaintiff, has the same right as other plaintiffs to institute and maintain actions in the district courts upon any cause of action of which, under the terms of the constitution, such courts have jurisdiction, and so by force of the jurisdiction conferred on such courts by the constitution, and without reference to any statutory authorization.").

parties do not.<sup>24</sup> But like personal jurisdiction, Texas law has long held that a governmental entity waives immunity by filing suit on an affirmative claim.<sup>25</sup>

Federal cases addressing the sovereign immunity of the states reflect this same hybrid nature, including elements of both subject-matter and personal jurisdiction.<sup>26</sup> And like the Texas rule, there is no question that states waive immunity from suit in federal court by claiming an interpleaded fund,<sup>27</sup> filing a bankruptcy claim,<sup>28</sup> or removing a case to federal court.<sup>29</sup>

Thus, the jurisdictional rules of sovereign immunity cannot be derived by simply plugging in the rules of subject-matter or personal jurisdiction governing private parties and cases. For one thing, those rules conflict. And because sovereign immunity includes elements of both but all of neither, there is no general rule about which should apply or be preempted.

Rather than abrogating sovereign immunity piecemeal or adopting rules governing either

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<sup>24</sup> Compare *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (“The trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed.”), with *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) (raising ripeness issue *sua sponte* as an element of subject-matter jurisdiction).

<sup>25</sup> *Kinnear v. Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000); *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107, 110 (Tex. 1939).

<sup>26</sup> See *Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (“In certain respects, the immunity [accorded states by the Eleventh Amendment] bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*. Permitting the immunity to be raised at any stage of the proceedings, in contrast, is more consistent with regarding [it] as a limit on the federal courts' subject-matter jurisdiction.”) (citations omitted).

<sup>27</sup> See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883).

<sup>28</sup> See *Gardner v. New Jersey*, 329 U.S. 565, 573-75 (1947); see also *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1004 (2006) (holding that States agreed “not to assert any sovereign immunity defense they might have had in proceedings brought” in bankruptcy).

<sup>29</sup> See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002).

subject-matter or personal jurisdiction wholesale, we should look to those rules for guidance, applying them (or a hybrid of them) according to the purposes and peculiar necessities of sovereign immunity. This is precisely what the Court has done when considering arguments to limit or abolish sovereign immunity completely, looking to the purposes behind the doctrine for guidance.<sup>30</sup> Considering those same purposes here shows why the traditional rule that a sovereign's affirmative claim waives immunity from suit is the right one.

First, sovereign immunity is founded on the presumption that governments will do justice to their citizens, by one means or another.<sup>31</sup> By filing suit in court, a government makes clear that it has chosen to pursue justice (and presumably not just for itself) through litigation, at least in that particular case.

Second, “[c]oercion . . . is incompatible with sovereignty.”<sup>32</sup> Without some indication of consent, “the powers of judicial tribunals, however great they may be, are not of a character so transcendent as to enable them to afford [a] remedy.”<sup>33</sup> But when a government voluntarily seeks affirmative relief from the courts, it is not coercion but cooperation for the courts to adjudicate the matter.

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<sup>30</sup> See *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695-96 (Tex. 2003).

<sup>31</sup> *State v. Snyder*, 18 S.W. 106, 109 (Tex. 1886) (“It is to be conclusively presumed, in the absence of a statute authorizing suit against the state in reference to a given matter, that it fully recognizes every just claim the citizen has against it, that in its own way it will do justice in reference thereto, and that it has ability to do so; and this is one of the reasons why no suit can be brought against the state without its consent.”); *Borden v. Houston*, 2 Tex. 594, 611-12 (1847); *Bd. of Land Comm’rs v. Walling*, Dallah 524 (Tex. 1843).

<sup>32</sup> *Borden*, 2 Tex. at 611.

<sup>33</sup> *Walling*, Dallah 524 (cited with approval by this Court in *Kenedy v. Jarvis*, 1 S.W. 191, 194 (Tex. 1886)); *accord*, *Snyder*, 18 S.W. at 106, 110; *Bates v. Republic*, 2 Tex. 616 (1847).

Third, sovereign immunity protects the government from the distraction and expenses that would ensue if citizens could sue the government whenever they pleased.<sup>34</sup> But again, when the government brings its own affirmative claims, it has obviously concluded that the distraction and expense of litigation is worthwhile in that particular case.

Fourth, the protection sovereign immunity affords to the public fisc suggests that a government waiver by filing a claim should be limited to that claim's extent.<sup>35</sup> Absent sovereign immunity, policy decisions regarding government spending would be made by judges and juries, not the Legislature.<sup>36</sup> That might still be the case if, when a government asserted its own claim, it waived sovereign immunity as to much larger counterclaims and entirely different transactions. By filing suit on a claim, a government consents to have the courts decide its entitlement to a particular sum, but no more.

Finally, while courts in these cases see separation among the branches, parties sued by the State may see only different parts of the same tree. This paradoxical three-in-one structure (which

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<sup>34</sup> *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002); *Walling*, Dallam at 525-26 (Tex. 1843) ("The experience of ages and the wisdom of the most enlightened statesmen and judicial expositors have sanctioned the doctrine that less injury would arise from the delay or even the denial of justice to individuals than from the distraction and imbecility consequent upon the government's being involved in continual and harassing controversies at the will or caprice of every citizen in the community.").

<sup>35</sup> *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707 (Tex. 1943); *Snyder*, 18 S.W. at 110; *Borden*, 2 Tex. at 611-12 (1847); *Bates*, 2 Tex. at 618.

<sup>36</sup> *IT-Davy*, 74 S.W.3d at 854 ("Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments."); *Bates*, 2 Tex. at 618.

no doubt resonated with the trinitarian Founders)<sup>37</sup> requires the courts at some point to insist that “[t]here is not one law for the sovereign and another for the subject.”<sup>38</sup> A rule allowing governments to make a claim but preventing all offsetting claims looks less like sovereign immunity than sovereign inequity.

Thus, the traditional rule of limited waiver by appearance is consistent with all of the purposes of sovereign immunity. It is not in “tension” with the jurisdictional rules governing private parties; it is simply a different rule.

Nor do I see any unresolvable tension between this rule and our frequent statements that sovereign immunity must be waived by the Legislature in clear and unambiguous terms,<sup>39</sup> for several reasons. First, while the Legislature has taken an active role in deciding which particular suits may be filed *against* governmental units,<sup>40</sup> it has not played the same role in limiting which particular suits may be filed *by* them. Trying to collect an affirmative claim does not raise the same kinds of concerns as trying to avoid one.

Second, while the Legislature may waive immunity in individual suits, in recent years it has

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<sup>37</sup> Cf. Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1680 (2005) (“In an analogy that would have resonated with the Founders, the trilogy of life, liberty, and property was as the Christian trinity of Father, Son, and Holy Spirit: three-in-one; the same, but different.”).

<sup>38</sup> *Fristoe v. Blum*, 45 S.W. 998, 1000 (Tex. 1898) (quoting *People v. Stephens*, 71 N. Y. 549).

<sup>39</sup> See, e.g., *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003); *IT-Davy*, 74 S.W.3d at 854; *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

<sup>40</sup> See *IT-Davy*, 74 S.W.3d at 862 (Hecht, J., concurring).

done so quite rarely.<sup>41</sup> Given the press of other business in a rapidly growing state, it is unrealistic to expect immunity decisions to be made piecemeal rather than collectively. The reasons for strictly construing waiver for whole classes of suits against the government are not the same when a single government unit files a single case.

Finally, when governments bring suit, they must do so through agents who ultimately derive their authority from the Legislature.<sup>42</sup> Those agents generally are not authorized to waive immunity from liability, or immunity from suit in individual cases. But when they file suit on an affirmative claim, they must be doing so with legislative authorization. If the rule were otherwise, it is not clear how a government could ever assert its own claims.

This Court found it “well settled” more than 100 years ago that governments who file suit must follow the same rules as the governed:

It is well settled that so long as the state is engaged in making or enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen; but when it becomes a suitor in its own courts, or a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual.<sup>43</sup>

When a government voluntarily enters a contract, it waives sovereign immunity from liability (though not suit) to that extent;<sup>44</sup> when a government voluntarily files suit, it waives sovereign immunity from suit (though not liability) to that extent as well. Because the City of Dallas filed an

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<sup>41</sup> *See id.*

<sup>42</sup> *See Pub. Util. Comm’n v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001).

<sup>43</sup> *Fristoe*, 45 S.W. at 999.

<sup>44</sup> *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405-06 (Tex. 1997).

affirmative claim here, it waived immunity from suit to that extent.

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Scott Brister  
Justice

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